

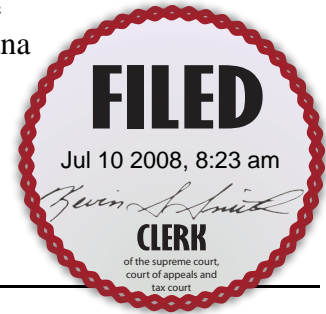
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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT J. NORRIS,

Appellant-Defendant,

VS.

BENNETT'S CLOTHING & SHOES, INC.,

Appellee-Plaintiff.

$$\begin{array}{c}) \\) \\) \\) \\) \\) \\) \\) \end{array}$$

No. 88A01-0712-CV-587

APPEAL FROM THE WASHINGTON SUPERIOR COURT
The Honorable H. Lloyd Whitis, Special Judge
Cause No. 88D01-0504-CC-119

July 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Robert J. Norris (Norris), appeals the trial court's judgment awarding Appellee-Plaintiff, Bennett's Clothing and Shoes, Inc. (Bennett's Clothing), damages plus additional interest and costs on its claim for breach of contract.

We affirm.

ISSUE

Norris raises two issues for our review, one of which we find dispositive and which we restate as: Whether the trial court's determination that Donna Norris was acting as Norris' agent when she signed his name as a co-signer on a promissory note was clear error.

FACTS AND PROCEDURAL HISTORY

Eric and Donna Norris (Eric and Donna), Norris' son and former daughter-in-law, agreed to purchase a retail clothing store from Bennett's Clothing. In addition, on September 30, 2003, Eric and Donna purchased inventory from Bennett's Clothing by paying \$15,000 and signing a promissory note agreeing to pay \$55,000 plus interest. The note provided in part:

No payments or interest for one year. On the second annual anniversary date and each anniversary date thereafter until five (5) years from the execution of this Note, the Buyers shall pay the accrued interest thereon and at least Five Percent (5%) of the principal amount of the Note. All sums of principal and interest shall become due and payable on September 30, 2008.

(Appellant's App. p. 18). Further, the note provided that in the event of default of any of the installments, "the entire unpaid balance of principal and interest shall become due and payable immediately, without notice, at the election of [Bennett's Clothing]." (Appellant's App. p. 18).

Eric and Donna presented the signed note to the co-owner's of Bennett's Clothing, David and Jamie Bower, at the office of David Allen (Allen), the attorney who had prepared the promissory note. David Bower (Bower) expressed that he wanted a co-signer. Eric and Donna explained that Norris would come by the store building later that day to sign the promissory note. While Eric, Donna, and Bower were at the clothing store later that day, Norris stopped by. Bower was with a customer while Norris was at the store and he did not see Norris sign the promissory note or hear Norris' conversation with Donna. After Bower finished helping the customer he walked over and saw that Norris' name was signed at the bottom of the note. Norris was walking away and Bower followed him out of the store and had a brief conversation with him. Bower explained the substance of the conversation at trial by stating: "Thanks for coming in. I think I actually thanked him. I thought it was a great thing that he did to help his children. And for coming and signing the promissory note." (Transcript p. 52). That same day, Bower took the promissory note, now with Norris' signature, to Allen's office, where Allen had copies sent to all the parties, including Norris.

On April 5, 2005, Bennett's Clothing filed a Complaint claiming Eric, Donna, and Norris owed "now due and unpaid \$55,000, plus interest." (Appellant's App. p. 16). Additionally, Bennett's Clothing claimed that the Eric, Donna, and Norris were liable for \$10,000 in reasonable attorney fees and "pre-judgment interest of 5% yearly from September 30, 2003." (Appellant's App. p. 16). Further, the Complaint alleged that the signature of Norris was authorized by him, if not signed by him, or, in the alternative that Eric and Donna had defrauded Bennett's Clothing.

On July 29, 2005, Norris moved to dismiss Bennett's Clothing's suit claiming that the first payment on the note was not due until September 30, 2005, and therefore no one was in default on the note. On August 15, 2005, the trial court granted Bennett's Clothing an opportunity to amend its Complaint, and on August 18, 2005, Bennett's Clothing filed a Complaint for a declaration of rights on the note, alleging that "[i]f the signature is not that of [Norris] it was specifically authorized by him," or, in the alternative that Eric and Donna had defrauded Bennett's Clothing. (Appellant's App. p. 33). On August 24, 2005, Norris answered the Complaint by stating, in part, that he did not sign the promissory note, nor did he authorize anyone to sign the promissory note. Further, Norris filed a counterclaim, alleging that the Complaint from Bennett's Clothing was frivolous. On October 27, 2005, Norris amended his answer to Bennett's Clothing's Complaint by adding that Bennett's Clothing knew "by and through its principals" that Donna signed Norris' name to the note without having Norris' authority. (Appellant's App. p. 44). "Therefore, [Bennett's Clothing's] knew the signature was forged and [] cannot under the theory of [*In Pari Delicto*] recover from [Norris]." (Appellant's App. p. 41).

On October 31, 2005, Eric and Donna filed a Notice of Bankruptcy and did not participate in the proceedings thereafter. On September 8, 2006, Norris filed a Motion for Summary Judgment, which the trial court denied on January 29, 2007. On August 28, 2007, the trial court held a bench trial, and Bennett's Clothing requested that the trial court make formal findings of fact and conclusions of law. At the trial Donna admitted that she had signed Norris' name to the promissory note, but testified that she did not have Norris' authority to do so. (Tr. pp. 101-02). Bennett's Clothing introduced evidence of Donna's

prior admissions that she did have Norris' authority to sign his name. The trial court found that Donna had signed Norris' name to the promissory note, but that she was acting as Norris' agent when she did so. Further, the trial court concluded that even if Donna's act of signing Norris' name to the note was unauthorized, Norris ratified her signing of his name by his subsequent acts or omissions. On November 7, 2007, the trial court issued its Order finding that the note was in default, that Norris is jointly and severally liable on the note with Eric and Donna, and that as of September 30, 2007, Norris owed Bennett's Clothing \$55,000 of principle and \$11,000 of interest, with an additional sum of \$7.5342 per day from September 30, 2007 until November 7, 2007. Additionally, the trial court ordered that the judgment would bear interest at rate of eight percent per annum after the date of the judgment.

Norris now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

The trial court has entered findings of facts and conclusions of law pursuant to Indiana Trial Rule 52. Therefore, we apply a two-tiered standard of review considering whether the evidence supports the findings and whether the findings support the judgment. *Todd Heller, Inc. v. Ind. Dep't of Transp.*, 819 N.E.2d 140, 146 (Ind. Ct. App. 2004), *trans. denied*. The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Id.* We do not reweigh the evidence or assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. *Id.*

II. *Purported Errors of the Trial Court*

The first section of argument by Norris purports to “Designate Errs in the Court’s Judgment or Findings of Fact or Conclusions of Law.” (Appellant’s Br. p. 20). Norris lists eleven different contentions of error, however, he fails to explain why any of these purported errors require reversal of the trial court’s judgment. Moreover, we find that the majority of the purported errors identified by Norris in this section of his Brief are needless repetitions of his arguments made elsewhere. Therefore, we move on to address Norris’ more developed arguments.

III. *Did the Trial Court Err when Finding Donna acted as Norris’ Agent when Signing His Name to the Promissory Note?*

Norris argues that the trial court erred when it found that Donna was acting as his agent when she signed his name to the promissory note. Specifically, Norris contends that the only evidence that Donna had authority to sign Norris’ name to the note came from her testimony which is insufficient to prove that she was Norris’ agent.

First, we note that the trial court only determined that Donna acted as Norris’ agent, but did not state how her authority was derived. The evidence presented to the trial court included Donna’s deposition, which was published at the trial and entered as evidence in its entirety. Donna stated when being deposed, first that she did not have Norris’ authority to sign his name to the promissory note, but then changed her position by stating:

[Plaintiff’s Counsel]: Okay. How did the name of Robert J. Norris get on this note, if you know?

[Donna]: Eric asked his dad.

[Plaintiff’s Counsel]: Okay. And how do you know that?

[Donna]: Eric told me.

* * *

[Plaintiff's Counsel]: Can you recall what Eric told you about his father's response to this extra money that was required?

[Donna]: He said that his dad okayed it.

(Appellee's App. pp. 58-59). Additionally, the trial court entered pleadings as evidence in response to a motion from Bennett's Clothing. Included in these pleadings is Donna's response to the Complaint from Bennett's Clothing, specifically her admission to the allegation that "[i]f the signature is not that of Robert J. Norris, it was specifically authorized by him." (Appellant's App. pp. 16, 24). Finally, Bower testified at trial that Eric and Donna informed him that Norris would come by the store to sign as a co-signer. Norris then came to the store and spoke with Eric and Donna, and when he left, his signature was affixed to the bottom of the promissory note. Bower thanked Norris for coming in. Bower took the promissory note to Allen's office. Allen had signed copies sent to the parties to the agreement, including Norris.

"An agent is one who acts on behalf of some person, with that person's consent and subject to that person's control." *Oil Supply Co., Inc. v. Hires Parts and Service, Inc.*, 726 N.E.2d 246, 248 (Ind. Ct. App. 2000). There are three classifications of authority that are generally recognized: (1) actual authority; (2) apparent authority; and (3) inherent authority. *Gallant Ins. Co. v. Isaac*, 751 N.E.2d 672, 675 (Ind. 2001).

Actual authority is created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the

principal desires him so to act on the principal's account. Apparent authority refers to a third party's reasonable belief that the principal has authorized the acts of its agent; it arises from the principal's indirect or direct manifestations to a third party and not from the representations or acts of the agent.

Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1210 (Ind. 2000), *reh'g denied* (citations and punctuation omitted). "Inherent agency power is a term used . . . to indicate the power of an agent which is derived *not* from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent." *Id.* (omission and emphasis in original). It is a status based form of vicarious liability which rests upon certain important social and commercial policies, primarily that a business enterprise should bear the burden of the losses created by the mistakes or overzealousness of its agents because such liability stimulates the watchfulness of the employer in selecting and supervising the agents. *Id.*

First, we conclude that the familial relationship between Norris and Donna does not support a finding of inherent agency power. Additionally, Norris did not make sufficient manifestations or statements to Bennett's Clothing to support a determination that Donna acted with apparent authority. Here, the only possible evidence of manifestations or statements made by Norris to Bennett's Clothing were Norris' failure to repudiate the promissory note after he received a copy with his signature thereon, and his silence when Bower thanked him. To the extent that failure to repudiate could be interpreted as an indirect manifestation or statement, we conclude that it would be insufficient for Bennett's Clothing to form a "reasonable belief" that Donna was Norris' agent based upon failure to repudiate alone. *See Menard, Inc.*, 726 N.E.2d at 1210. Furthermore, Bower did not testify that he

uttered aloud that he had thanked Norris for co-signing the promissory note (See Tr. p. 52), and without such testimony, Norris failure to respond that he did not co-sign provides nothing to our analysis. Therefore, Donna was not Norris' agent by way of apparent authority, and we are left to determine whether Donna had actual authority to sign Norris' name.

The strongest evidence relevant to Donna having actual authority to act as Norris' agent is her deposition testimony and her admission. However, statements of a purported agent are not sufficient to establish an agency relationship. *Gill v. Pollert*, 810 N.E.2d 1050, 1061 (Ind. 2004). That being said, Donna's statements are bolstered by the additional evidence of Norris' failure to repudiate the promissory note. Further, although we have concluded that the familial relationship between Donna and Norris does not support a determination that Donna had inherent authority to sign on his behalf, that same relationship nevertheless supports an inference that Donna is an individual who Norris might give actual authority to sign his name. Norris' arrival at the store at the time when he was expected to co-sign the promissory note is additional support for an inference that Norris gave Donna actual authority to sign on his behalf. Considering all this evidence together, we cannot say that the trial court's determination that Donna acted as Norris' agent when she signed the promissory note was clearly erroneous.¹

¹ Additionally, Norris argues that the trial court erred when it found that even if Donna's signing of Norris' name was not authorized when the name was signed, Norris ratified his signature on the promissory note. Ratification is a question of fact and is defined as the adoption of that which was done for and in the name of another without authority. *Beneficial Mortgage Co. v. Powers*, 550 N.E.2d 793, 796 (Ind. Ct. App. 1990), *reh'g denied, trans. denied*. Because we have concluded that the trial court did not commit clear error when it determined that Donna was acting as Norris' agent by way of actual authority, we need not address Norris' contention in regards to whether he ratified his signature on the promissory note.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not commit clear error when it determined that Donna acted as Norris' agent when she signed his name to the promissory note.

Affirmed.

BAKER, C.J., and ROBB, J., concur.